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FILED
DISTRICT COURT OF GUAM

JAN 13 2005

MARY L.M. MORAN
CLERK OF COURT

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF GUAM

JULIE BABAUTA SANTOS, et. al.,

Petitioners,

-v-

FELIX P. CAMACHO, etc., et. al.

Respondents.

CIVIL CASE NO. 04-00006

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION TO QUASH OR MODIFY
SUBPOENAS AD TESTIFICANDUM
FOR HEARING OF JANUARY 19,
2005**

ORIGINAL

1 The Governor of Guam (the "Governor") respectfully submits this memorandum
2 of points and authorities in support of the motion to quash or to modify the subpoenas ad
3 testificandum served by the Attorney General of Guam demanding the testimony at the January
4 19, 2005 hearing of Governor of Guam Felix P. Camacho, his Legal Counsel Shannon Taitano
5 ("Ms. Taitano"), his Spokesperson Erica Perez ("Ms. Erica Perez"), his Chief of Staff Anthony
6 Sanchez ("Mr. Sanchez"), and his Executive Assistant Shawn Gumataotao ("Mr. Gumataotao").¹

8 INTRODUCTION

9 The Attorney General insists that he represents the Governor in this case. He
10 wishes to do so for the purpose of asserting legal positions on "behalf" of the Governor with
11 which the Governor strongly disagrees, while silencing the Governor's right to be heard. Now,
12 the Attorney General has subpoenaed the Governor—his supposed client—along with four of the
13 Governor's top staff, to testify at the January 19, 2005 hearing. Nothing could more clearly
14 illustrate the lack of a workable attorney-client relationship between the Attorney General and the
15 Governor in this case than this hostile and unnecessary maneuver.

17 The subpoenas seek testimony on no topic that is discernibly relevant to the
18 January 19, 2005 hearing. The hearing concerns two issues. The first is whether the motion to
19 adopt an administrative plan should be denied without prejudice while the Court determines:
20 (1) whether it ever had subject-matter jurisdiction over this action and (2) whether the settlement
21 violates Guam's Illegal Expenditures Act. The second is whether the Governor, Ms. Lourdes
22 Perez, and Mr. Ilagan may retain counsel to protect their interests as defendants in this case. The
23 Attorney General gives no indication of any testimony that the Governor or his subordinates
24 (other than defendants Ms. Lourdes Perez and Mr. Ilagan, who are already committed to testify)

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27 ¹ Copies of these subpoenas are attached hereto as exhibit A-E to the Declaration of
28 Daniel M. Benjamin in Support of Motion to Quash or Modify Subpoenas ("Benjamin Decl.")

1 could possibly provide that would be relevant to the legal issues at stake. This alone requires
2 quashing the subpoenas under Fed. R. Civ. P. 45(c)(3)(A)(iv).

3 The subpoenas also fail to comply with federal standards governing the
4 subpoenaing of senior executive officials. They seek the testimony of the Governor personally,
5 with no showing of need for his personal testimony as opposed to that of subordinates, and no
6 showing that the subpoenas will not invade matters of executive discretion. Under such
7 circumstances, federal law requires quashing the subpoena of the Governor pending a
8 demonstration that a less-senior official cannot address the matter and that the matter is an
9 appropriate subject for the subpoena of a senior executive officer.

11 The Governor also respectfully requests that if the subpoenas of the Governor, Ms.
12 Taitano, and/or Mr. Gumataotao are not quashed or modified on other grounds, the Court modify
13 the date for testimony to accommodate the Governor's and his staff's other duties. On January
14 19, 2005, the Governor, Ms. Taitano, and Mr. Gumataotao will be attending the inauguration of
15 the President of the United States in Washington, D.C. This is an important and obligatory
16 function for the Governor as the chief executive officer of Guam, and the Governor had already
17 selected Ms. Taitano and Mr. Gumataotao to attend the inauguration events with him and assist
18 him in using this opportunity to meet with important federal and state officials in regard to
19 various issues affecting the island. Thus, the Governor hopes that if the Court finds the Attorney
20 General can demonstrate relevancy, the Court can accommodate the Governor's and his staff's
21 other governmental obligations and schedule an alternative date.

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28 The subpoenas were also subpoenas duces tecum, but those portions of the subpoenas are not the
subject of this motion.

ARGUMENT

I. THE SUBPOENAS SEEK IRRELEVANT TESTIMONY FROM THE GOVERNOR AND HIS STAFF

“On timely motion, the court by which a subpoena was issued **shall** quash or modify the subpoena if it ... requires disclosure of privileged or other protected matter and no exception or waiver applies, or subjects a person to undue burden.” FRCP 45(c)(3)(A)(iii)-(iv) (emphasis added). This requirement is mandatory. *E.g.*, Advisory Committee Notes to 1991 Amendment to Rule 45 (“Subparagraph (c)(3)(A) identifies those circumstances in which a subpoena must be quashed”).

Where the information subpoenaed is “not relevant nor calculated to lead to the discovery of admissible evidence, then any burden whatsoever imposed upon [the party subpoenaed] would be by definition ‘undue.’” *Compaq Computer Corp. v. Packard Bell Electronics, Inc.*, 163 F.R.D. 329, 335-36 (N.D. Cal. 1995); *Jones v. Hirschfeld*, 219 F.R.D. 71, 77 (S.D.N.Y. 2003) (granting motion to quash because of the “inexorable conclusion that Mr. Clinton has no relevant information to offer”); *Wiesenberger v. W. E. Hutton & Co.*, 35 F.R.D. 556, 557-58 (S.D.N.Y. 1964) (quashing subpoena because it sought tax records that were irrelevant to litigation).

The glaring feature of the subpoenas for the testimony of the Governor, Ms. Taitano, Ms. Erica Perez, Mr. Sanchez, and Mr. Gumataotao for the January 19, 2005 hearing is the complete absence of any suggestion by the Attorney General as to what, if any, potentially relevant testimony they might produce. At the January 19, 2005 hearing, the Court is examining two issues. The first issue is whether the motion to adopt an administrative plan should be denied without prejudice while the Court determines: (1) whether it ever had subject-matter jurisdiction over this action given, among other things, the lack of exhaustion and inappropriateness of class actions in tax refund cases; and (2) whether the settlement violates Guam’s Illegal Expenditures

1 Act because there was not \$60 million in any fund to support the contract when it was signed.
2 The second issue is whether the Governor, Ms. Lourdes Perez, and Mr. Ilagan can retain
3 independent counsel to represent their interests as defendants in this case. Nothing suggests that
4 the subpoenas at issue seek to elicit testimony relevant to these two issues.
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6 The Attorney General has filed five briefs and memoranda that relate to the
7 upcoming January 19, 2005 hearing.² Yet, nowhere in any of these filings does he state that any
8 of the subpoenaed officials are needed to testify at this hearing. Nor does he raise any factual
9 questions on which their testimony is needed. Nor has he disclosed any purpose to these
10 subpoenas in any communication to the Governor.
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12 The only possible indication of what might be intended as topics for testimony are
13 the document demands that are attached to the subpoenas.³ (See Benjamin Decl. Exhs. A-E
14 (attaching document demands).) These document demands, which address four basic topics,
15 strongly support the conclusion that the Attorney General is pursuing topics irrelevant to the
16 upcoming hearing.
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18 The Attorney General seeks to have Ms. Erica Perez and Mr. Gumataotao provide
19 documents regarding the press statements the Governor has made concerning the EITC. (See
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21 ² These are: (1) Memorandum of Points and Authorities in Response to Petitioner's
22 Motion for Orders Approving Administration Plan, Etc. filed on November 8, 2004; (2) Motion
23 of Respondents and Attorney General to Strike Entry of Appearance of Rawlen MT Mantanona
24 and to Strike All Subsequent Documents Filed Herein by Rawlen MT Mantanona; (3) Motion of
25 Respondents and Attorney General for Relief from Order Issued by the Court on November 12,
2004; (4) Motion of Respondents and Attorney General to Strike Entry of Appearance of Calvo &
Clark, LLP and Purported Entry of Appearance of Shannon Taitano, Esq. and to Strike all
Subsequent Documents Filed Herein by Calvo & Clark, LLP and Shannon Taitano, Esq. all filed
on December 6, 2004; and (5) Attorney General's Response to Governor's Objections and
Opposition to Petitioner's Motion for Approval of the Administration Plan Filed November 24,
2004 filed on December 7, 2004.

26 ³ These document demands themselves seek irrelevant and privileged materials, and will
27 be addressed by the Governor through appropriate objections pursuant to FRCP 45(c)(2)(B). The
28 demands are also duplicative as the Attorney General's office already requested identical
documents under Guam's Sunshine Act, and has already received all non-privileged documents

1 Benjamin Exhs. C, E.) Press statements, or testimony about them, cannot be relevant to whether
2 the settlement contract violates Guam law. No press statements by any person on that subject,
3 either supporting or denying the contract's legality, would have any bearing on the legal question
4 itself. What matters legally is whether the settlement is or is not supported by an appropriation or
5 fund worth \$60 million, and thus does or does not violate the Illegal Expenditures Act. The
6 witness who can provide relevant testimony on this subject is Ms. Lourdes Perez. As the Director
7 of Administration, she is the government officer with knowledge of the funds possessed by the
8 government. And she is already prepared to take the stand to explain to the Court her declaration
9 of November 24, 2004 that adequate funds do not exist.
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11 The Attorney General also has subpoenaed the Governor and Mr. Sanchez for any
12 records of the payment of the EITC to "anyone" in 2004. (See Benjamin Exhs. A, D.)
13 Compliance with these document subpoenas would violate federal criminal law because, under 26
14 U.S.C. § 7213(a), federal or state official cannot disclose the tax records of any taxpayer.
15 Accordingly, if the production of individual tax records is prohibited, so too is testimony as to
16 those tax records. See FRCP 45(c)(3)(A)(iii) (subpoena must be quashed where it seeks
17 privileged information). And, in any case, this also would be an irrelevant topic. Payment of an
18 EITC claim to "anyone" in 2004 would have no more bearing on the legality of the settlement
19 than a press statement would. Any such payment would have no relevance to the legality of a
20 settlement that attempts to commit the Government of Guam to pay \$60 million in unfunded
21 claims and \$6 million in attorneys' fees as a matter of contract law.
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23 The Attorney General also seeks to have the Governor and Ms. Taitano provide
24 documents concerning the procurement procedures followed by the Governor, Ms. Lourdes
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27 not already possessed by the Attorney General's office in response to those Sunshine Act
28 Requests.

1 Perez, and Mr. Ilagan in procuring legal services. (See Benjamin Exhs. A, B.) But these
2 procurements go only to the issue of whether their chosen counsel can be *paid* (an issue not
3 before the Court). Procurement procedures have nothing to do with whether the Governor, Ms.
4 Lourdes Perez, and Mr. Ilagan are entitled to appear through independent counsel of their
5 choosing when the Attorney General refuses to represent their interests faithfully, obey their
6 instructions, or even tell them what he wants (the issue before the Court). Again, if this is an
7 intended topic of testimony, it fails to meet the relevancy standard.
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9 Finally, the Attorney General seeks to have Ms. Taitano provide documents
10 regarding the communications between the Attorney General's office and the Office of the
11 Governor concerning the EITC. (See Benjamin Exh. B.) Along with raising issues of privilege,
12 any such communications cannot show that the Attorney General has faithfully represented the
13 Governor. The Attorney General has conceded to this Court that he did not do so and does not
14 intend to do so. In the Attorney General's brief dated November 8, 2004, the Attorney General
15 expressly stated that he would not follow the Governor's instructions. (See Attorney General's
16 MPA in Response to Petitioner's Motion for Orders Approving Administration Plan, Etc. (filed
17 11/8/04) at 6 (claiming that "[t]he Governor is without authority to 'instruct' the Attorney
18 General....").) In fact, that brief was filed in the Governor's name but without any notice to the
19 Governor or any permission from the Governor as the purported client.⁴
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22 In sum, the Attorney General has identified no ground demonstrating the relevancy
23 of any of these witness subpoenas to the issues of the January 19, 2005 hearing, witness
24 subpoenas that instead only underscore the inconsistency and inappropriateness of the Attorney
25 General's continued insistence that he represents the Governor despite his hostility to the
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27 ⁴ This sequence was fully detailed and documented on page 2 of the Governor's Request
28 for Hearing and Objection filed November 9, 2004, and the Attorney General has never disputed
its accuracy.

1 Governor's positions. The Attorney General's accompanying document demands, if at all
2 probative, completely support the conclusion that no relevant testimony is being sought through
3 these subpoenas. For these reasons, the subpoenas must be quashed. Fed. R. Civ. P. 45(c)(3)(A).

4 **II. THE ATTORNEY GENERAL HAS FAILED TO DEMONSTRATE THAT**
5 **TESTIMONY FROM ONE OF THE GOVERNOR'S SUBORDINATES**
6 **WOULD BE INADEQUATE OR THAT THE TESTIMONY WILL NOT**
7 **CONCERN MATTERS OF EXECUTIVE DISCRETION**

8 Even if some of the other government witnesses subpoenaed were to be needed to
9 testify—either at the upcoming hearing or in the future—no circumstance supporting the
10 subpoena of the Governor himself has been shown. High-ranking officials should not be
11 compelled to testify until it is first demonstrated that testimony from subordinates is inadequate:

12 Department heads and similarly high-ranking officials should not
13 ordinarily be compelled to testify unless it has been established that
14 the testimony to be elicited is necessary and relevant and
unavailable from a lesser ranking officer.

15 *Halderman v. Pennhurst State School and Hosp.*, 96 F.R.D. 60, 64 (D. Pa. 1982) (citing *Sneaker*
16 *Circus, Inc. v. Carter*, 457 F. Supp. 771, 794 n.33 (E.D.N.Y. 1978); *United States v. Northside*
17 *Realty Assoc.*, 324 F. Supp. 287, 293 (N.D. Ga. 1971)). Further, compelled testimony of high-
18 ranking executive officials should not be required where they may be asked for testimony on their
19 discretionary determinations, which are matters of executive discretion. *Northside Realty Assoc.*,
20 324 F. Supp. at 293 ("It has been recognized that a member of the Cabinet or the head of a large
21 executive department should not be called upon to give his deposition if such deposition is taken
22 in order to probe the mind of the official to determine why he exercised his discretion as he did in
23 regard to a particular matter.") (citing *De Cambra v. Rogers*, 189 U.S. 119, 122 (1903); *United*
24 *States v. Morgan*, 313 U.S. 409, 422 (1941)); *Marisol A. v. Giuliani*, 1998 WL 132810, at *2-3
25 (S.D.N.Y. Mar. 23, 1998) ("high ranking government officials are not subject to depositions
26 absent a showing by the party seeking the deposition that '(1) the deposition is necessary in order
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1 to obtain relevant information that cannot be obtained from any other source and (2) the
2 deposition would not significantly interfere with the ability of the official to perform his
3 governmental duties.”); accord *In re United States*, 985 F.2d 510, 511-13 (11th Cir.), cert.
4 denied, 510 U.S. 989 (1993) (“the Supreme Court has indicated that the practice of calling high
5 officials as witnesses should be discouraged”) (citing *Morgan*, 313 U.S. 409).

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7 These rules apply to the Governor. *Sweeney v. Bond*, 669 F.2d 542, 546 (8th Cir.
8 1982) (governor not required to testify where plaintiffs “failed to show that Governor Bond
9 possessed information which was essential to plaintiffs’ case and which could not be obtained
10 from Director James or other staff members”).⁵ Here, the Attorney General has as much as
11 admitted that the Governor holds no unique knowledge that requires his particular presence. The
12 document requests attached to the subpoena of the Governor are exactly the same four requests
13 that are attached to the subpoena of Ms. Taitano. (Compare Benjamin Decl. Exh. A (subpoena of
14 the Governor) with Exh. B (subpoena of Ms. Taitano).) Further, even without Ms. Taitano’s
15 presence, most of these four sets of documents are also requested from Ms. Lourdes Perez, Mr.
16 Sanchez, and Mr. Ilagan. (See Benjamin Decl. Exhs. B, F, G.) The document requests are the
17 only available indication of what the Attorney General would seek in testimony from the
18 Governor. There is simply no demonstrated need for the Governor to testify as any legitimate
19 inquiries can be addressed by a lower ranking officer. *Halderman*, 96 F.R.D. at 64. The
20 Governor asks that his subpoena either be quashed or modified to require his testimony only after
21 the Attorney General demonstrates that his inquiries cannot be addressed by a lesser ranking
22 official and do not improperly intrude on executive discretion. *Id.*; *Northside Realty Assoc.*, 324
23 F. Supp. at 293

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27 ⁵ Abrogated on other grounds by *O’Hare Truck Service, Inc. v. City of Northlake*, 518
28 U.S. 712 (1996) (addressing issue regarding rights of public contractors).

1 **III. THE GOVERNOR, MS. TAITANO, AND MR. GUMATAOTAO ARE**
2 **OBLIGATED TO BE IN WASHINGTON D.C. ON OFFICIAL BUSINESS**
3 **ON JANUARY 19, 2005**

4 The Governor's and his office's principal objection to the Attorney General's
5 subpoenas is their lack of relevancy, as well as the inadequate showing with regard to why the
6 Governor needs to testify. Therefore, the Governor does wish to emphasize that his staff (within
7 the bounds of governing privileges) are available to testify if the Court should find their testimony
8 relevant. In fact, Mr. Ilagan and Ms. Perez have been instructed by the Governor to be prepared
9 to testify at the January 19 hearing given that they may possess information relevant to that
10 hearing (especially Ms. Perez, who can address the issue of a lack of funding for the settlement).⁶

11 However, if the Governor, Ms. Taitano, or Mr. Gumataotao is required, a problem
12 arises because the Court's hearing is scheduled for January 19, 2005. The inauguration of
13 President Bush is that same week, and the governors of all States and the territories are expected
14 to attend this event and the surrounding meetings and functions. (See Decl. of Shawn
15 Gumataotao in Support of Motion to Quash or Modify Subpoenas at ¶ 2 & Exh. A (Governor's
16 Itinerary).) This is an important event for Guam as it represents an opportunity for the Governor
17 and selected senior staff to engage in formal and informal meetings and lobbying of federal
18 officials for the benefit of the island. (*Id.* ¶ 3.) Thus, prior to being served with the subpoenas,
19 the Governor already had made arrangements not only for his attendance, but also for the
20 attendance of Ms. Taitano and Mr. Gumataotao, who will both be assisting the Governor in his
21 efforts. (*Id.* ¶ 4.)

22 Thus, given the nature of their obligations, it is respectfully requested that if the
23 testimony of Ms. Taitano, Mr. Gumataotao, or even the Governor himself, is required by the
24 Court, then either the January 19 hearing be rescheduled or the subpoenas be modified to address
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28 ⁶ Of course, they may still object to irrelevant or privileged lines of questioning.

1 the undue burden they otherwise would cause by permitting the testimony to occur at a
2 subsequent hearing held after their return from Washington, D.C. See FRCP 45(c)(3)(A)&(B)
3 (court may modify or quash subpoena for protection of subpoenaed person).)

4
5 **CONCLUSION**

6 For the foregoing reasons, the Office of the Governor respectfully requests that the
7 Court quash or modify the subpoenas ad testificandum of the Governor, Ms. Taitano, Ms. Erica
8 Perez, Mr. Sanchez, and Mr. Gumataotao.

9 Dated this 13th day of January, 2005.

10 OFFICE OF THE GOVERNOR OF GUAM
11 CALVO AND CLARK, LLP
Attorneys at Law

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13
14 By: 

DANIEL M. BENJAMIN